

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
March 20, 2007 Session

DEXTER L. MCMILLAN v. JUDGE RAY LEE JENKINS, ET AL.

**Appeal from the Circuit Court for Knox County
No. 3-164-06 Wheeler A. Rosenbalm, Judge**

No. E2006-01017-COA-R3-CV - FILED APRIL 11, 2007

The appellant, Dexter L. McMillan, appeals the trial court's dismissal of his suit to set aside his June 7, 1988, criminal conviction. After careful review, we find no error and affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed;
Case Remanded**

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Dexter L. McMillan, Knoxville, Tennessee, *pro se* Appellant.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; and Lizabeth A. Hale, Assistant Attorney General, for the Appellees, Judge Ray Lee Jenkins and Robert E. Edwards.

OPINION

I.

On June 7, 1988, Dexter L. McMillan pleaded guilty in the Knox County Criminal Court to the offenses of aggravated assault with a deadly weapon and assault with intent to commit first degree murder. Pursuant to a negotiated plea agreement, Mr. McMillan was sentenced to 20 years in prison. Nearly 18 years later, Mr. McMillan sued his former attorney, Robert Edwards, and Knox County Criminal Court Judge Ray Lee Jenkins, in Knox County Circuit Court. The suit was captioned "MOTION FOR VIOLATION OF THE UNITED [sic] STATES CONSTITUTION OF AMERICA, THEREFORE REMOVE THE CONVICTION THAT HAS NEVER HAPPEN IN OPEN COURT ON JUNE 7, 1988."

The Defendants filed a response seeking a dismissal of the case. They asserted that Mr. McMillan was attacking a facially valid conviction in a collateral proceeding, which is not

permissible pursuant to the United States Supreme Court's ruling in *Mabry v. Johnson*, 467 U.S. 504, 508-509 (1984). The Defendants argued that Mr. McMillan had previously filed an unsuccessful petition for habeas corpus relief in state court and an unsuccessful civil rights suit in federal court against his former attorney, Mr. Edwards. After hearing arguments from the parties, the trial court dismissed the case, finding that Mr. McMillan's case had been previously heard and decided and that the pleading failed to state a claim upon which relief could be granted. Mr. McMillan appeals the trial court's dismissal of this case.

II.

The issue before us is whether the trial court erred in granting the Defendants' motion to dismiss. A Tenn. R. Civ. P. 12.02(6) motion to dismiss for failure to state a claim upon which relief can be granted tests only the legal insufficiency of the complaint, not the strength of the plaintiff's proof. *Cook v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn. 1994). In our review, we are required to construe the complaint liberally in Mr. McMillan's favor and take the allegations of the complaint as true. *Id.* As we stated in *Pendleton v. Mills*, 73 S.W.3d 115 (Tenn. Ct. App. 2001):

The sole purpose of a Tenn. R. Civ. P. 12.02(6) motion to dismiss is to test the sufficiency of the complaint, not the strength of the plaintiff's evidence. *Doe v. Sundquist*, 2 S.W.3d 919, 922 (Tenn. 1999); *Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 986 S.W.2d 550, 554 (Tenn. 1999). It requires the courts to review the complaint alone, *Daniel v. Hardin County Gen. Hosp.*, 971 S.W.2d 21, 23 (Tenn. Ct. App. 1997), and to look to the complaint's substance rather than its form. *Kaylor v. Bradley*, 912 S.W.2d 728, 731 (Tenn. Ct. App. 1995). Dismissal under Tenn. R. Civ. P. 12.02(6) is warranted only when the alleged facts will not entitle the plaintiff to relief or when the complaint is totally lacking in clarity and specificity. *Dobbs v. Guenther*, 846 S.W.2d 270, 273 (Tenn. Ct. App. 1992).

A Tenn. R. Civ. P. 12.02(6) motion admits the truth of all the relevant and material factual allegations in the complaint but asserts that no cause of action arises from these facts. *Winchester v. Little*, 996 S.W.2d 818, 821-22 (Tenn. Ct. App. 1998); *Smith v. First Union Nat'l Bank*, 958 S.W.2d 113, 115 (Tenn. Ct. App. 1997). Accordingly, courts reviewing a complaint being tested by a Tenn. R. Civ. P. 12.02(6) motion must construe the complaint liberally in favor of the plaintiff by taking all factual allegations in the complaint as true, *Stein v. Davidson Hotel*, 945 S.W.2d 714, 716 (Tenn. 1997), and by giving the plaintiff the benefit of all the inferences that can be reasonably drawn from the pleaded facts. Robert Banks, Jr. & June

F. Entman, *Tennessee Civil Procedure* § 5-6(g), at 254 (1999). On appeal from an order granting a Tenn. R. Civ. P. 12.02(6) motion, we must likewise presume that the factual allegations in the complaint are true, and we must review the trial court's legal conclusions regarding the adequacy of the complaint without a presumption of correctness. *Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furne & Ginsburg, P.A.*, 986 S.W.2d at 554; *Stein v. Davidson Hotel*, 945 S.W.2d at 716.

Pendleton, 73 S.W.3d at 120-21.

As a *pro se* litigant, Mr. McMillan is entitled to fair and equal treatment by the courts. We realize that he likely does not have legal training and therefore, he is granted some leeway in the drafting of his pleadings. However, he must comply with the same substantive and procedural rules that represented parties are expected to observe. *Young v. Barrow*, 130 S.W.3d 59, 62-63 (Tenn. Ct. App. 2003).

III.

Mr. McMillan's motion, which we construe as a complaint, alleges that his federal constitutional rights were violated because his 1988 guilty plea in Knox County Criminal Court was obtained by malice and fraudulent practice and was not taken in open court. He requested that the Knox County Circuit Court vacate the conviction and award him damages.

Mr. McMillan made essentially the same allegations in this case as he did in the application for writ of habeas corpus he filed in April of 2000. The trial court dismissed that petition, finding that Mr. McMillan had not raised any claims cognizable for habeas corpus relief. In affirming the dismissal, the Court of Criminal Appeals noted that "[g]enerally involuntary guilty pleas are not subject to attack by petitions for issuance of the writ of habeas corpus. Rather, judgments based upon invalid guilty pleas are voidable and should be challenged through a petition for post-conviction relief." *McMillan v. State of Tennessee*, No. M2000-1929-CCA-R3PC, 2000 WL 1611058, at *1 (Tenn. Crim. App. M.S., filed Oct 27, 2000) (internal citation omitted).

Although not stated as such, Mr. McMillan is seeking the relief that is afforded by the Post-Conviction Procedure Act, Tenn. Code Ann. § 40-30-103. This Act provides for relief when a conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Tennessee Constitution or the Constitution of the United States. However, Mr. McMillan's petition does not comply with the requirements of the Act in several important ways. First, it was filed too late, as the petition was required to have been filed within one year of the date the judgment became final. Tenn. Code Ann. § 40-30-102(a). Additionally, the petition had to be filed with the clerk of the court in which the conviction occurred and had to name the state as the defendant. Tenn. Code Ann. § 40-30-104(a). Mr. McMillan filed this petition in a civil court, not in the Knox County

Criminal Court as he should have; he also failed to name the state as a defendant. In essence, Mr. McMillan is seeking post-conviction relief in an untimely and procedurally incorrect manner.

As noted, Mr. McMillan has, in previous filings in other courts, sought relief from his criminal conviction. In addition to the application for a writ of habeas corpus that he filed in April 2000, *McMillan v. State of Tennessee*, 2000 WL 1611058, Mr. McMillan also filed suit in federal court against his former attorney, Mr. Edwards, alleging a civil rights violation arising from Mr. McMillan's conviction, *McMillan v. Edwards*, No. 02-5132, 2002 WL 31770360 (6th Cir. 2002). Neither case was successful. It is evident that Mr. McMillan feels he has been treated unfairly by the criminal justice system and that he has sought to obtain a remedy. If there ever were any remedies available to Mr. McMillan, the time for seeking such relief has long since expired. In this case, Mr. McMillan failed to allege any facts which state a cause of action. The trial court had no authority to set aside Mr. McMillan's criminal conviction or grant him any relief and accordingly, did not err in dismissing his case.

We affirm the decision of the trial court and remand for collection of costs. Costs on appeal are assessed to the Appellant, Dexter L. McMillan, and his surety.

SHARON G. LEE, JUDGE